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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 481

VIKING THEATRE CORPORATION, *Petitioner*,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CCURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Viking Theatre Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the direction of a verdict for the respondents at the close of the petitioner's evidence.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in the appendix to this petition. App. 1a-31a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1963. App 32a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the trial court was based on the Clayton Act, §§ 4, 16, 38 Stat. 731, 737, 15 U.S.C. §§ 15, 26.

QUESTIONS PRESENTED

1. Whether a court may take from the jury consideration of a classic *per se* violation of the Sherman Act—a division of the market—when the existence of the restriction is admitted by the alleged conspirators.

2. Whether the Sherman Act is violated by a "split" agreement among three of the eight first-run film exhibitors in Philadelphia, controlling seven of the twelve first-run theaters and 83.2% of the first-run seating capacity, and the seven major film distributors, whereby the three exhibitors divide among themselves the total product of the distributors and each of the three undertakes not to compete with either of the others but to compete only with the five non-participating exhibitors who control a total of only 16.8% of the available seating capacity.

3. Whether the Sherman Act is violated when such a "split" agreement is supplemented by an additional agreement among at least two of the three splitting exhibitors and at least one of the distributors that, in the event of competition for a film by any of the five non-participating exhibitors, if the distributor should reject all bids, he would thereupon negotiate exclusively with the exhibitor to whom the film was allocated in the split.

4. Whether the Sherman Act is violated by the "split" agreement described in Question 2 when the

three splitting exhibitors use the dominant market power obtained by means of the agreement to gain over the non-participating exhibitors such discriminatory market advantages as exclusive negotiating rights with distributors for films, better terms for similar type pictures, more advantageous adjustments of license terms when a film does not live up to expectations, and a larger proportion of high quality pictures per theater.

5. Whether the evidence to prove a conspiracy in violation of the Sherman Act may be limited to transactions in which the plaintiff was involved, excluding all other evidence of the defendants' activities germaine to market domination and discrimination between the plaintiff and his competitors.

6. Whether the court below, by its holdings on the issues inherent in Questions 1-5, has not so severely limited the private antitrust suit as to cripple it as a device for enforcement of the antitrust laws, thereby expanding the litigative task of the Department of Justice and, consequently, increasing the burden of the Court in this field.

STATUTES INVOLVED

Section 1 of the Sherman Act, c. 647, 26 Stat. 209, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Section 2 of the Sherman Act, c. 647, 26 Stat. 209, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any

other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

The petitioner, Viking Theatre Corporation, owns a single first-run theater in downtown Philadelphia.

The respondents include seven major film distribution companies and three film exhibition chains in Philadelphia. The seven respondent distributors, who admittedly dominate the distribution field, are Paramount, Columbia, Universal, United Artists, Warner Bros., MGM, and Twentieth Century Fox.[1] The respondent exhibitors are William Goldman Theatres, Inc. ("Goldman"), a company operating twelve theaters in and around Philadelphia; Stanley Company of America and Stanley Warner Management Corporation (jointly called "Stanley Warner"), an exhibition circuit consisting of over 300 theaters, including three first-run theaters in downtown Philadelphia; and Fox Philadelphia Building, Inc. ("Fox"), an affiliate of National Theatres, Inc., the operator of a nationwide theater chain. R. 1766.

On November 12, 1956, the petitioner filed suit in the United States District Court for the Eastern Dis-

[1] The full names of the respondent distributors are Paramount Film Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures Distributing Company, Metro-Goldwyn-Mayer, Inc., and Twentieth Century Fox Film Corporation.

trict of Pennsylvania under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, alleging that the seven respondent distributors conspired with the three respondent exhibition chains to drive the petitioner out of business in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. R. 5-12. At the close of the petitioner's evidence, the district court directed a verdict for the respondents on the ground that there was insufficient evidence to submit to the jury. R. 2352-54. On appeal, the Third Circuit Court of Appeals affirmed. App. 1a. The petitioner seeks a writ of certiorari in this Court.

Philadelphia Market Restrictions: The Split System

Viking entered the first-run motion picture market on July 2, 1954. R. 1512. From that date until November 19, 1956, the period covered by this suit, the distributors of motion pictures recognized the following theaters in the Philadelphia area as first-run theaters:

FIRST-RUN PHILADELPHIA THEATERS

Theater	Location	Owner	Seating Capacity Floor	Balcony	Total	% of Phila Seating
Viking	19th and Chestnut	Viking	947	70	1017	5.6
Goldman	15th near Chestnut	Goldman	988	200	1188	6
Midtown	Chestnut near Broad	Goldman	994	0	994	5.4
Randolph	12th & Chestnut	Goldman	1366	654	2020	11
Mastbaum	21st & Market	Stanley Warner	2498	1889	4387	24
Stanley	19th & Market	Stanley Warner	1450	1482	2932	16
Stanton	16th & Market	Stanley Warner	783	590	1373	7.5
Fox	16th & Market	Fox	1333	1089	2422	13.3
Translux	16th & Chestnut	—	493	0	493	2.7
Arcadia	16th & Chestnut	—	650	0	650	3.6
Studio	Market near 17th	—	400	0	400	2.2
World	Market near 18th	—	499	0	499	2.7
					18375	100

In spite of the number of theaters and owners on the date of Viking's entry, there was no substantial competition among exhibitors for first-run pictures. The market was controlled by no-competition agreements among the three respondent film exhibitors who controlled 83.2% of the first-run theater seating capacity. These agreements, in which the seven respondent distributors concurred in effect allocated the product of the distributors among these three exhibitors.

In 1951, Stanley Warner and Goldman prevailed on MGM to split its product between them in offering it to exhibitors in the Philadelphia market. By the summer of 1953, similar arrangements had been worked out with United Artists, Columbia, Universal, Paramount, and Warner Bros. R. 85, 124-30. The operation of the split was described as follows by Simon Fabian, president of Stanley Warner:

> "Well, the usual method is that a group of pictures, we will say six pictures, are on the release schedule of the Paramount Company or the Warner Company, and either Goldman or Stanley will arrange a split of these two products, three and three, three on each side. Then the one who does not arrange the split has the right to the first pick of these two groups. The next group of six pictures will be split by the other party, and the one who didn't pick the first pick as between the two groups." R. 102.

Ostensibly, the split was not a final allocation of films but merely an agreement between Stanley Warner and Goldman on the films for which they would bid. Its whole purpose, as Simon Fabian readily admitted on the stand, was to eliminate competition between the Stanley Warner and Goldman theaters for film product. R. 79-82.

A separate understanding ran between Stanley Warner and Goldman, on the one hand, and Fox on

the other. Fox sought films exclusively from Twentieth Century Fox and did not bid on the films of the other major distributors.[2] In return, Stanley Warner and Goldman agreed not to bid on Twentieth Century Fox films. R. 87-89.

The distributors acquiesced in the split, even though it was detrimental to their interest. As William Mansell, the Warner Bros. branch manager, admitted, if Stanley Warner had been competing with Goldman, Warner Bros. would have received higher rentals for its films. R. 2010. The reason the distributors acquiesced in the split could only have been that, since the severance of the exhibition business from the distribution business which the *Paramount*[3] decrees effected, the decisive bargaining power has resided with the large exhibition chains.[4]

The Schwalberg Agreement

As if the split alone were not a sufficient restriction on competition for the acquisition of films, respondents added a further refinement. In the summer of 1953, Mr. Fabian and Mr. Goldman met with Alfred Schwalberg, then president of Paramount, to formalize the split agreement with Paramount. The resulting agreement not only assured the split, but also made possible an absolute exclusion from the market of any

[2] Twentieth Century-Fox, for its part, implemented these agreements through its preference for Fox as an exhibitor of its films. While such a preference, standing alone, has no antitrust implications, it becomes invidious as a component of an elaborate system of market restriction.

[3] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131.

[4] "The buying power of large circuits in dealing with distributors remains a crucial issue in spite of divorcement and some individual divestitures. Does not the bargaining power of the entire circuit (100 theatres of Loew's or 500 of American Broadcasting-Paramount Theatres) stand behind the booking for each of its theatres?" Conant, *Antitrust in the Motion Picture Industry* 144 (1960).

independent exhibitor. As the agreement was described in a memorandum from Hugh Owen, vice president of Paramount, to George Weltner, Schwalberg's successor as president:

> "The so-called 'Schwalberg agreement' with Goldman of Philadelphia envisaged an equal division, qualitively and quantitively (sic), of our product between Goldman and Stanley Warner in Philadelphia.
>
> "Under this arrangement bids were invited from Stanley Warner and Goldman, as well as other theatres in Philadelphia requesting a bid invitation. If any bid was acceptable the acceptance closed the sales file. If no bid was acceptable, Paramount agreed to negotiate with either Stanley Warner or Goldman, governed by whether the individual picture was on Goldman's or Stanley Warner's split.
>
> "My understanding is that we were not permitted, if all bids were rejected, to negotiate with the unsuccessful bidders or any other theatre that did not offer a bid. We were obligated, upon rejection of all bids, to negotiate with one or the other, and I am told that, in one or more cases, the negotiated deal was reviewed or adjusted.
>
> "This arrangement whether authorized or not, was actually in effect." R. 2393.

The substance of the agreement was confirmed by the testimony of Schwalberg himself. R. 1834.

The agreement jibed with Goldman's philosophy on bidding. He openly stated that he was opposed to competitive bidding for films since it tended to drive up the price. R. 1634-36. He therefore refused to bid on films, bidding competitively on only one film in which Viking was interested during the period in question in this suit. R. 2386. He negotiated rather than

bid and, even then, objected to the distributor comparing his negotiated offer with that of another exhibitor. As Mr. Schwalberg described Goldman's position; "he didn't want Paramount to take that [negotiated] bid across the street and try to better it." R. 1834.

Although the respondents attempted to show that the Schwalberg agreement did not exist, or in the alternative, was never put into effect, the Court of Appeals held that a jury issue was presented on the existence and operation of the agreement. The direction of the verdict for the respondents should, therefore, have been reversed. Strangely enough, although three respondents were parties to this agreement, the Court of Appals avoided reversal by holding that no conspiracy was shown since only one distributor was included. App. 14a.

In light of this split system, it is apparent that there was insubstantial competition for films in the Philadelphia market prior to Viking's entry on July 2, 1954.

Viking's Entry Into the Market

From 1924 until 1953, Stanley Warner operated the Aldine as a first-run theater. R. 64, 1496-97. In March 1953, Simon Fabian of Stanley Warner decided to "eliminate it as a theater" because of its poor physical condition. R. 68. On June 22, 1953, Stanley Warner agreed to sell the Aldine to Harry Sley, R. 1495, and title was transferred in September. R. 1502.

When Sley began to renovate the theater, Fabian, fearing Sley's competition, attempted to buy the theater back and close it; however, the parties were unable to agree on a repurchase price. R. 74-78; 1502-03. Sley then completed the renovation, installing air-conditioning, the finest projection equipment avail-

able, a wide screen, and new seats with additional leg room, R. 1503-05, correcting the very defects which had initiated Fabian's decision to close the theater. On July 2, 1954, petitioner, Sley's corporation, opened the theater as the Viking. R. 1512. Situated in the midst of the Philadelphia theater district, see chart *supra*, the Viking was in a prime position to compete for films and audiences. As such, it represented a breath of fresh competitive air in the Philadelphia market and a substantial threat to the split system.

Economic Effects of the Split System

Elimination of Competition

The split agreements in and of themselves made it impossible for Viking to compete effectively for first-run films. The record shows that during the 123 weeks in question in this suit, the Viking played 32 first-run films, Goldman's three theaters averaged 45 pictures, the three Stanley Warner theaters averaged 97, and the Fox played 41. R. 2644-48; 2751-54; Goldman Brief in the Court of Appeals, p. 3; Stanley Warner Brief in the Court of Appeals p. 24.[5] This means that on the average, these exhibitors were in the market for a film at the following rate:

Exhibitor	Licensed on average[6] one film every:
Viking	27 days
Goldman	6½ days
Stanley Warner	3 days
Fox	21 days

[5] A copy of each of the said briefs has been lodged with the Clerk of the Court.

[6] These figures were obtained by dividing the total number of films played by each of the above exhibitors into the total number of weeks in the suit period and then converting the result into days. The number of films played by each exhibitor may be found in the last given citations in the text.

Viking was therefore in the market for about one film a month and had to compete with one of the other three exhibitors on every film it acquired. Goldman and Stanley Warner, however, on account of the split eliminating competition between them, had to meet a competitive offer on only one out of every 4.2 and one out of every nine films respectively.[7] As a result Viking had to pay substantially more for its films than either Stanley Warner or Goldman, and even more than it would have paid in a freely competitive market. For, as both Goldman and the manager of Warner Bros. readily admitted, competition drives up the price of a film. Viking could therefore expect a higher relative cost for films since it had to compete for every film it obtained whereas Goldman and Stanley Warner competed with Viking only 24% and 11% of the time respectively and never with each other. Moreover, because Goldman and Stanley Warner could conserve resources under the umbrella of their no-competition agreements while Viking was out of the market, they could bid up films when Viking came into the market beyond even what the price would be in a freely competitive market.[8] The substantial difference in film cost this analysis would suggest is borne out by the

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[7] These figures were obtained by dividing the average intervals in which Goldman and Stanley Warner were in the market, 6½ and 3 days respectively, into the average interval in which Viking was in the market, 27 days.

These figures disregard the competitive impact of the four independent exhibitors controlling a total of only 11.2% of the first-run seating capacity. See chart, *supra* p. 5. But that impact, as shown *infra* pp. 20-21, could have had no very substantial effect upon the control of the market by the respondent exhibitors.

[8] Even Mr. Goldman felt that the competitive bids Viking had to offer in order to obtain films were excessive. R. 1634-35.

record. Viking paid out 52% of its box-office receipts in film rental during the period in question while the average for Goldman and Stanley Warner theaters was only 40%. In more detail, those theaters closest in size to the Viking paid the following:

Theater	Seating	Film rental as % of gross receipts[9]
Viking	1017	52%
Goldman	1100	33%
Midtown	994	42%
Stanton	1373	38%

With lower relative film costs, Goldman and Stanley Warner could obtain a higher net income and better return on their capital—the ultimate standard of business success or failure. This competitive advantage over Viking is a direct consequence of the split system.

Monopoly Market Position

However, there was an even more important advantage in the split from the point of view of the respondent exhibitors. For the split put Goldman and Stanley Warner in a monopoly bargaining position vis-a-vis the distributors for pictures on their respective sides of the split. Returning to the figures used above, Viking was in the market for a film on an average of once a month. If Viking took this film alternately from the Goldman and the Stanley Warner sides of the split, it would license an average of one film from each side every two months. The distributor therefore had to figure that Viking would take only one film for every 8.4 films taken by Goldman from the Goldman side of

[9] All percentage figures are calculated on the basis of gross income and film rental figures appearing at R. 2067.

the split and one for every 18 taken by Stanley Warner from its side.[10] This put Goldman and Stanley Warner in virtual monopoly bargaining positions over their respective splits—a result solely attributable to the split eliminating competition between them. And should Viking take any Twentieth Century Fox films from the Fox Theater preserve, the monopoly position of Goldman and Stanley Warner would increase still further. Faced by exhibitors with a monopoly position over the films on their respective splits, distributors could be expected to discriminate in favor of the monopolists and against Viking. The record more than substantiates this position.

Discriminatory Practices

The Schwalberg Agreement, providing exclusive negotiating rights after the rejection of all bids, is a good example of Goldman's and Stanley Warner's exercise of their monopoly bargaining position. As even the Court of Appeals held, the jury could have found the existence and operation of this agreement with Paramount. Moreover, a similar agreement, even if not express, appears to have been in operation with other distributors as well. For example, on two occasions, Warner Bros. requested bids for pictures on the Goldman split. R. 2359. Viking submitted bids. In

[10] These figures are obtained on the basis of the chart, *supra* p. 5. If Viking took one film alternately from each side of the Goldman-Stanley Warner split, it would acquire one film from each side every 54 days. Goldman and Stanley Warner, however, took pictures from their sides of the split every time they entered the market, i.e., every 6½ and 3 days respectively. The ratio of Goldman films to Viking films from the Goldman side of the split would therefore be 8.4. The same ratio for the Stanley Warner side of the split would be 18.

the subsequent letters rejecting Viking's bids, Warner Bros. announced that the films had been licensed to Goldman. R. 2612-13. What remained unexplained, however, was the fact that Goldman had not submitted bids on either film. R. 192-93. Clearly, Goldman had been given an exclusive right to negotiate for the films on rejection of all bids. And, as under the Schwalberg agreement, Warner Bros. did not take his negotiated "bid across the street and try to better it."

Respondent Goldman tried below to offset this pattern of favoritism by showing that in fact Viking had taken a significant number of films on the Goldman split and therefore competed effectively with Goldman. What this argument ignores is that the films licensed to Viking were those that Goldman found too unattractive to take. Although a Goldman witness stated broadly that Goldman tried to get every picture on the Goldman split, he admitted, on further examination, that Goldman had never made either a written bid or an oral offer for any picture played by Viking during the suit period. R. 1788-89.

A further set of discriminatory practices requires a more extensive description of the motion picture industry. Since each motion picture is a unique combination of story and cast, it is impossible to extrapolate with precision the box-office appeal of an untested film. The only dependable rating is one calculated on hindsight based on the total rental earned by the picture during its exhibition across the country, a term known as the national film rental. Since no such standard is available before exhibition, the exhibitor must use his best judgment in formulating a bid based on a screening of the picture and his expertise in pre-judging the tastes of his local market. The substance of his bid will then include a

guaranteed playing time, film rental terms, and extras such as advertising agreements. The film rental is usually based on a percentage of box office receipts, sometimes with a minimum guaranteed. Once a license is granted, the exhibitor is legally bound by its terms. But because of the difficulty in prejudging a picture, the actual box-office receipts may vary substantially from the estimate on which the original offer was based. When this occurs, it is usual for the exhibitor to seek an adjustment with the distributor on either the length of the run or the rental terms. The record in this case overwhelmingly demonstrates that the respondent distributors discriminated in favor of the respondent exhibitors in granting such adjustments.

As Viking offered to prove, the defendant exhibitors received the following film rental adjustments, during the period of the suit (R. 1049-50):

Exhibitors	Number of Adjustments Total	Average Per Theater
Goldman	48	16
Stanley Warner	82	27.3
Fox	13	13

Viking, by way of contrast, received film rental adjustments on only *two* first-run pictures. R. 498-499; 1049.

Viking's failure to receive more than two film rental adjustments was not for lack of trying. It requested and was refused rental adjustments on 19 of the 32 first-run pictures it played during the period of the suit.

The facts relating to playing time adjutments are similar. Typical of the attitude of the respondent ex-

hibitors was the remark by Mr. Beattie of Goldman that it was the practice to terminate the run of a picture at Goldman's Randolph Theater when the weekly gross got down to about $10,000. Such action was taken irrespective of the contractual provisions of the license and often over the objection of the distributor. R. 1828-29. But the distributors always submitted. When Viking attempted self-help in adjusting either rental or playing time, the distributors were by no means as submissive. On three occasions, they brought suit on the contract for total film rental due and recovered. R. 303 (Twentieth Century Fox); 624-26 (MGM); 698 (Universal).

The pattern of discrimination practiced by respondent Universal warrants special attention. The first Universal picture in which Viking expressed an interest was "All that Heaven Allows." Negotiations for the film were held in New York with Mr. Dana, Universal's division manager. To get the one picture Viking wanted, Mr. Dana insisted, contrary to the anti-block booking decree in *United States* v. *Paramount Pictures, Inc.*, 344 U.S. 131, that Viking also take three other pictures, only one of which it had screened, and pay film rental guarantees totalling $85,000. R. 205-210. As a result of being compelled to take the package (by its need for film and by Universal's refusal to sell less than the package), Viking was tied up for thirteen weeks with the following disastrous financial results:

Picture	Box-Office Receipts	Earned Film Rental	Film Rental Paid
"Second Weakest Sex"	$ 20,186	$ 4,735	$17,500 (guarantee)
"All That Heaven Allows"	54,763	28,242	28,242
"There's Always Tomorrow"	19,780	7,503	17,500 (guarantee)
"Never Say Goodbye"	20,799	6,472	22,500 (guarantee)
Totals	$115,528	$46,952	$85,742

Upon licensing the four films, Mr. Dana informed Viking, in conformity with the usual trade understanding, "If you are hurt in any way, you come back and see me and I will make sure that you are not hurt." R. 209. After the losses shown above, Viking did seek an adjustment. At one point Universal offered a $15,000 adjustment, but withdrew it with the remark:

> "Well, I have offered you $15,000, but I understand you fellows are bringing an antitrust action, and don't intend to give anybody any money that intends to sue my company." R. 303.

Universal then brought suit on the license contract for the full rental guarantee. R. 698.

Universal's treatment of Goldman and Stanley Warner is startling by contrast. During the period of the suit, there were ten Universal pictures grossing over $19,000 on Philadelphia first-run, seven of them played by Goldman and three by Stanley Warner. On every single one of the ten pictures Universal gave a film rental adjustment, Goldman receiving a total of $15,722.52 and Stanley Warner a total of $16,866.90. Moreover, on six of the seven pictures it played, Goldman was allowed to cut the run by from one to three weeks. On two of its three, Stanley Warner was allowed to cut the run by one week. R. 2603-04.[11]

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[11] Although it may appear as if Viking were offered a film rental adjustment equal to that given Goldman and Stanley Warner, it is an illusion. Viking had to offer guarantees on all four of its films; Stanley Warner offered a guarantee on only one of its three; Goldman offered no guarantees on its seven. The $15,000 adjustment offered to Viking as a reward for not bringing the instant action applied only to the guarantees and would have left Viking's film rental payment to Universal still $24,790 in excess of the rental actually earned by the films under the terms of the license. The adjustment to Stanley Warner, on the other

Viking's experience with Universal serves also to illustrate the disastrous effects minimum rental guarantees may have on an exhibitor. The more guarantees he must offer, the greater likelihood that he will suffer serious financial reverses. To obtain film product, Viking was required to offer guarantees on 14 of the 32 films it played during the suit period. By contrast, Goldman was required to offer a guarantee on only one of the 134 pictures it played. R. 1780-81.

Result of the Conspiracy

The detrimental effects of the split system and the inevitable discriminatory practices which it engendered, are indelibly written in the business records of the respective exhibitors. A central economic fact of the motion picture industry is that box-office receipts diminish as a picture runs. R. 2644-48; 292-93. The better the picture the slower the decline, R. 293; but with every picture there comes a point where recipts no longer cover costs. This fact of business life lay behind Goldman's policy of yanking a picture from the Randolph when the weekly gross dipped below $10,000. R. 1829. Thus, to succeed, an exhibitor must curtail the runs of poor pictures and confine his long runs only to good pictures. He can survive with comparatively poor pictures if he limits their runs to a week or so. A rough measure of success, therefore, consists of two factors: quality of films and number of films. As quality goes down, number must go up. If both are down, a theater must stagger and fail.

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hand, brought the rental on the one film with a guarantee down to the earned film rental and on the other two films well below earned film rental. The Goldman adjustment reduced the payments on all seven of his films well below earned film rental.

Examined in the light of this analysis, the result of the conspiracy becomes clear. Viking played substantially fewer pictures with substantially less total value than any of the respondent exhibitors. As shown *supra* p. 10, Viking played 32 pictures; the Goldman theaters averaged 45; the Stanley Warner theaters averaged 97; and Fox played 41. The total national film rental of the pictures Viking played was $45 million, while Goldman and Stanley Warner averaged about $72 million per theater and the Fox figure was $80 million. R. 1048-49.

These figures are explained by the fact that Viking played fewer quality pictures and had a slower turnover of poor pictures than any of the respondent exhibitors. Of the high quality films with national film rental over $4 million, Viking had one, while the six Goldman and Stanley Warner theaters averaged 4.3 each, and Fox had four. R. 1043-44. As to films with national film rental over $3 million, Viking had two, Goldman's theaters averaged six, Stanley Warner's theaters averaged 6.6, and Fox had nine. *Ibid.* Of the low quality films, Viking had 16 with national film rental of under $1.5 million, which it played for 44 of the 123 weeks covered by the suit. R. 294-296. The Goldman Theatre, by contrast, in 52 weeks in which it played such slough product, played 52 pictures.[12] R. 892; see also Goldman Brief in the Court of Appeals, p. 3. What this means is that Goldman was able to get those pictures in and out in a week, with an excellent chance to show a profit, while Viking had to

[12] Stanley Warner followed a similar policy. It played pictures of lower average national film rental than Viking, but it turned them over so rapidly (97 pictures per theatre as compared with Viking's 32) that it skimmed off the profits and avoided the losses.

run them for an average of almost three weeks, either because required by contract or because it could get no pictures to replace them. The merest glance at Exhibit P-176, R. 2644-48, will show that on such slough pictures, Viking had to lose money after the first week. Moreover, because of the discrimination practiced by the distributors, Viking could not follow Goldman's practice of curtailing runs when they became uneconomic.

The Independents

The respondents claimed that the four independent theaters (Translux, Arcadia, Studio, and World) kept competition in Philadelphia humming even before Viking came into existence. They argued there were no non-competitive lulls in the market while Viking was tied up for its average 27 days per film, and that there were many alternative outlets to which the distributors could turn if the three respondent exhibitors made unreasonable demands. This argument, however, has little rational or evidentiary support.

Even when added together, the seating capacities of the four independents equalled only 11.2% of the available seating in the Philadelphia market. See chart *supra* p. 5. Against them were ranged the three respondent exhibitors with 83.2% of the available seating, tied to each other by no-competiton agreements. The fact that these no-competition agreements lowered the price of films to the block, as admitted by the manager of Warner Bros., is itself persuasive that the independents constituted an insubstantial competitive force. Their limited seating capacities (three being below 500) generally precluded strongly competitive bids on films with mass audience appeal. On such few

occasions as they secured such films, they obviously required very long runs to compile an adequate gross, thereby taking themselves out of the market altogether for many weeks or months. In tacit recognition of these economic facts of life, Goldman described the competitive situation as follows when he sought the split with MGM:

> "There were no other theatres operating here but the Warner Theatres and the Fox and the Viking Theatre wasn't in existence at the time . . . R. 1634.

Had the trial court not arbitrarily limited Viking's proof, (see Question Presented No. 5 and *infra* pp. 28-31), this point would have been proved beyond question at trial. But even without such proof, the evidence of discrimination against Viking and the self-evident effects on Viking's business speak eloquently of the effectiveness of the split.

REASONS FOR GRANTING THE WRIT

1. By validating the split system in this case, the court below has authorized buyers' restraints of the trade of motion picture distribution no less offensive to the antitrust laws than the sellers' restraints struck down in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131. For the Philadelphia split system is nothing more nor less than a division of the market among buyers, *per se* illegal under an unbroken chain of Supreme Court and lower court opinions under §§ 1 and 2 of the Sherman Act.

If the present case involved a division of markets among *sellers*, the result would be a foregone conclusion. Long before the Sherman Act, contracts dividing marketing territories were held void and unen-

forceable under the common law because of their inevitable anti-competitive effects. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497. That they were equally invalid and actionable under the Sherman Act was concluded in *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, and more recently re-affirmed in *United States* v. *National Lead Co.*, 332 U.S. 319, *affirming* 63 F. Supp. 513 (SDNY 1945), and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593.

Although many of the cases speak in terms of territorial divisions, the essence of the illegal restraint is the division of *customers* between the conspirators. Thus an agreement by three national beer distributors not to solicit each other's draft beer customers in a single territory was held illegal on a theory identical to the *Addyston* line of cases. *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176 (ED Tenn. 1940), *aff'd*, 123 F. 2d 1016 (6th Cir. 1941). In accord with this conclusion, the Supreme Court referred to "allocation of customers" as "per se violations under § 1 of the Sherman Act." *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 708.

Although the split in this case is a division of the market among buyers rather than sellers, the applicable case law is identical. The Sherman Act applies to buyers' conspiracies as well as to sellers'. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235. And the *per se* rules applicable to sellers have been applied equally to buyers. *Mandeville Island Farms, supra*, (price fixing); *Klors* v. *Broadway-Hale Stores*, 359 U.S. 207 (group boycott instituted by "monopolistic buying power"). This conclusion is nowhere more evident than in the series of Supreme Court cases concerning conspiracies

among motion picture exhibitors involving the whole spectrum of traditional monopolistic and anti-competitive practices. *Interstate Circuit* v. *United States*, 306 U.S. 208; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173; *United States* v. *Griffith*, 334 U.S. 100; *Schine Chain Theatres* v. *United States*, 334 U.S. 110. In each of these cases, the exhibitors had "pooled their buying power for a common end"—namely, "to crush competition." *Crescent Amusement Co., supra*, at 183.

The essence of the split system in the present case, as already pointed out, is the division of the product market among the respondent exhibitors. The purpose of this system, as both Goldman and Stanley Warner freely admitted, was to eliminate competition for films among the respondent exhibitors, a system that rendered non-competitive 83.2% of the available seating in the Philadelphia market. Goldman disliked competition because it tended to drive up the price, and Warner Bros. admitted that the system resulted in lower rental terms for its product. On these admissions alone, a jury would be warranted in concluding that (1) substantial competition had been eliminated, and (2) the resultant noncompetitive block represented sufficient buying power to affect significantly the market price.

It is equally apparent that the split system greatly increased the respondent exhibitors' bargaining power over their respective splits to the detriment of distributors and independent exhibitors such as Viking. For not only did the respondent exhibitors concentrate their buying power in their respective split markets, but this very concentration vitiated the effectiveness of the independents who still competed in all markets.

On the basis of these facts there can be little doubt that the split system in this case has every attribute of the classic division of markets agreement. Such agreements were severely condemned in the following analysis in the *1955 U.S. Att'y Gen. Report on Antitrust*, p. 26:

> "Where actual or potential competitors agree not to compete in specified territories, or for specified customers, the consequence is to reduce the number of sellers [buyers] in each affected market. Competition among the contracting parties is elminated even more completely than had they agreed on prices but still did business in the relevant markets. The contracting parties gain only if the result is to give each a substantial degree of power in his own market. If a large number of strong competitors remain despite the contract, no contracting party profits from elimination of even a significant competitor. Where market division agreements among competitors are proved, they are held to be unreasonable, on the analogy of the *Trenton Potteries* decision, by reason of their character and necessary effect on competition. They are agreements with no purpose other than the elimination of competition; and, where significant shares of the market are involved, their effect on the degree of competition in the market can be severe."

The Report concluded:

> "There is little doubt, either as a matter of principle or of precedent, that agreements among competitors for market division should be and are treated like price control arrangements."

On the basis of this analysis and the *Addyston Pipe* line of cases, the petitioner argues that both lower

courts should have held the split system *per se* illegal under § 1 of the Sherman Act.[13]

The only argument put forward to support the split system as a reasonable market restriction is found in *Brown* v. *Western Mass. Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961). The court there noted that competitive bidding was considered suicidal to exhibitors and concluded that a split system was one of the few alternative methods of distribution. This position has been further reinforced in the industry by the Justice Department, which approved a split in two small towns, Alpine and Wichita Falls, Texas, involving two and three exhibitors respectively.

Whatever the validity of the above argument, it has no application here. The Justice Department's action in the two small Texas towns was conditioned on the split being equitable and consented to by all exhibitors. By letter to counsel for the petitioner, the Department expressly limited its approval to the facts of those cases, see letter reprinted in Appellant's Supplemental Brief in the Court of Appeals, p. 23;[14] it has never extended this position to the situation where not all the exhibitors are included in the split. Nor has it stated its position where a party with an adverse interest opposes even an all-inclusive split. *Cf. Samuel Gold-*

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[13] The respondent distributors, having concurred and acquiesced in the split system, are also liable for violating the Sherman Act even though the system was primarily for the benefit of the respondent exhibitors. *Interstate Circuit* v. *United States*, 306 U.S. 208; *Klors* v. *Broadway-Hale Stores*, 359 U.S. 207.

[14] Nine copies of the Supplemental Brief have been lodged with the Clerk of the Court.

wyn Productions Inc. v. *Fox West Coast Theatres Corp.*, 194 F. Supp. 507 (all-inclusive split held illegal).[15]

In this case the split system is not all-inclusive. The respondent exhibitors, representing seven of the 12 first-run theaters in Philadelphia and backed by the buying power of significantly larger chains outside this market, have employed the system to restrict only a part of the relevant market. At that point, all the discriminatory power latent in the restricted system comes to bear on the independent exhibitors and Viking. The result must then be the same under a *per se* or reasonableness analysis. For once the restriction and its power to effect the market price is admitted, the sole remaining issue is whether the parties to the combination do in fact use their augmented power to g... discriminatory advantages over competitors. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 524-25; *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594. The discriminatory practices outlined in the Statement of the Case establish beyond question the unlawful ends to which the respondent exhibitors put their augmented buying power under the split system.

To reach the contrary conclusion, the court below had to disregard this Court's recent caveat in the

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[15] That suit was by a producer who claimed that split systems among all the distributors and exhibitors in various far-western markets violated the Sherman Act and caused unreasonably low returns on the distribution of his pictures. The district court agreed, calling the split system a collusive allocation of films. The defendants chose to accept a $300,000 judgment plus attorneys fees rather than test the system in an appellate court. Further, in *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 250 (2d Cir. 1959) where a split system was involved but not in issue, Judge Washington seemed to have doubt as to the legality of the system.

Continental Ore Co. v. *United Carbide Corp.*, 370 U.S. 690, 698-99,[16] that it should view the character and effect of the alleged conspiracy as a whole. Instead, it treated the petitioner's claims as a series of separate conspiracies, and found reasons why the evidence relevant to each should not be considered. The court disregarded the Schwalberg agreement on the ground that only one distributor conspired with the respondent exhibitors, App. 14a; it further disregarded evidence of rental adjustments and other discriminatory practices on the ground that the respondent distributors were not shown to have conspired to engage in each of those activities, App. 17a, 26a-28a. It further held that the doctrine of conscious parallelism would not correct this last defect. App. 27a-28a.

This anaylsis, however, misconceives the petitioner's position. The conspiracy was complete when the distributors agreed to institute the split system among the respondent exhibitors. The discriminatory practices are themselves merely illustrative of the illegal effects the conspiracy had on the market. The fact

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[16] The Court stated:

"It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U.S. 525, 544 . . .; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 106 (C.A. 6th Cir.). See *Montague & Co.* v. *Lowry*, 193 U.S. 38, 45-46."

that different distributors chose to favor the respondent exhibitors in different ways is of no consequence. Whichever practice a distributor chose to follow, whether it be through a Schwalberg-type agreement, discriminatory adjustments, or what have you, it was still reacting to the increased bargaining power granted the respondent exhibitors under the split system.

2. The decision below rests on a theory of evidence which, if not exploded by this Court, could well spell an end to private antitrust suits.

A total of 468 films were licensed to first-run theaters in the Philadelphia area during the suit period. Viking expressed an interest in only 87. In a misguided attempt to limit the size of the case, the trial court ruled that evidence would be admitted on only these 87. To support this ruling, the trial court rationalized that, since Viking could only be injured with respect to films on which it bid, evidence as to the rest was irrelevant. R. 216-18. The court disregarded the petitioner's contention that evidence of the respondents' activities with regard to the 381 films which Viking did not seek to license, while not serving to prove Viking's losses, was the best possible proof of the cause of those losses, the operation of the conspiracy. This restrictive ruling was followed throughout the trial although the petitioner repeatedly sought its reversal. R. 1038-54; 1766-68; 2010-26; 2263-68.

The truncating effect of this ruling on the petitioner's case is easily seen by reference to the Statement of the Case. Every comparative figure used to show the respondent exhibitors' dominant economic market power under the split system, and every comparative figure used to show the discriminatory pur-

poses to which this power was put was excluded under this evidentiary ruling. The facts are in the record for demonstration to this Court only by way of offers of proof. Without them, it would be impossible for the petitioner to give a coherent statement of the conspiracy.

Contrary to the trial court's ruling, evidence relevant to proof of a conspiracy is by no means limited to transactions in which the plaintiff participated; indeed, evidence may relate to events occuring before the plaintiff's existence. In *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 709-10, the plaintiffs sought to introduce evidence to prove the origin and development of the alleged conspiracy and monopolization during the eight years prior to their entry into the market. The trial court found all such evidence irrelevant. On sending the case back for a new trial, the Court directed:

> This evidence was clearly material to petitioners' charge that there was a conspiracy and monopolization in existence when they came into the industry, and that they were eliminated in furtherance thereof.

Accord, *Baush Machine Tool Co.* v. *Aluminum Co. of America*, 72 F. 2d 236 (2d Cir. 1934). Similarly, the Court has always found an analysis of the existing market structure and business practices during the suit period relevant to the determination of a statutory violation. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527, the Court said that "in determining what constitutes unreasonable restraint," it looks "to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize,

the probable development of the industry, consumer demands, and other characteristics of the market." When such an analysis reveals that the defendants have dominant market power and engage in practices intended to eliminate or unduly restrict competition, a violation of the Sherman Act is found. *American Tobacco Co.* v. *United States*, 328 U.S. 781. When either of these factors is missing, it is not. See *United States* v. *Columbia Steel Co., supra; Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594.

In the present case, the trial court excluded from consideration the very evidence which would have permitted a finding of dominant market power under the split system and discriminatory effects resulting therefrom. Although there is a judicial obligation to keep the long, involved cases within manageable bounds, that obligation cannot be served by the exclusion of necessary evidence. As the caveat to the Prettyman "Big Case" Report states:

> "This report relates to *unnecessary*[17] volume, expense and delay. Many cases involving modern commerce, economics, finance and industry are inherently complicated and necessarily involve considerable time and expense. *Necessary features of such cases should not be curtailed.*"[18] Procedure in Anti-trust and Other Protracted Cases, 13 F.R.D. 62, 65.

This point of evidentiary error was the petitioner's opening argument in its brief below. The respondents, having no answer to it, ignored it. So also did the court below, thereby approving *sub silentio* a rule that

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[17] Emphasis in original.

[18] Emphasis added.

makes it impossible for a private antitrust plaintiff to prevail in the Third Circuit.

3. Certiorari should be granted here in the interests of antitrust enforcement and of lightening the Court's burden in that respect. The bulk of antitrust cases coming to the Court are brought by the Department of Justice and come by way of direct appeal under the Expediting Act, 15 U.S.C. § 29. This mode of access to the Court has serious disadvantages. The Court has no discretion in taking the case, and must forego the advantage of an intermediate appeal which would sift the important issues from the usually gargantuan record. Moreover, since civil cases brought by the United States are tried to a judge, there is a marked tendency towards *per se* rulings with correlative loss of the flexibility inherent in jury dispositions. The number of such government-brought cases will tend to be limited to the extent that the antitrust laws can be vigorously enforced through private antitrust actions. The efficacy of the private antitrust action, however, depends upon a sympathetic hearing in the Courts of Appeals.

By its holding here sought to be reviewed, the court below has emasculated the private antitrust action within its jurisdiction.

A significant distinguishing factor of antitrust law in the judicial process is that, in this area, more than in most others, the individual judges tend to have strong, even if unconscious, economic predilections. The jury system stands as a safeguard against the subversion of antitrust law administration to any such personal economic philosophy. The court below, by approving a free-wheeling application of the directed

verdict, has nullified this safeguard. In an attempt to protect the jury from "speculation," it has taken from it the right to consider the validity of a classic economic restriction, a division of the market. Moreover, even for cases allowed to go to the jury, the court below has vitiated a private antitrust plaintiff's right to fair consideration of his claim. It has approved *sub silentio* an evidentiary ruling that makes it impossible to prove violations involving practices of any greater sophistication than the most neanderthal predatory type.

The importance of these holdings is accentuated in this case by the failure of the Justice Department to take a position on split systems restricting only part of a relevant market. For the petitioner has lost not only his sole effective private remedy, but any expectation of public remedy. With the petitioner's loss of hope goes the respondents' loss of fear to engage in further illegal activities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER, 1963.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,756

VIKING THEATRE CORPORATION, *Appellant*,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted July 23, 1962

Before: BIGGS, *Chief Judge*, GANEY and SMITH, *Circuit Judges*.

Opinion of the Court

(Filed June 21, 1963)

SMITH, *Circuit Judge*.

This is an action under the antitrust laws, and particularly under Sections 4 and 16 of the Clayton Act, 15 U.S.C.A., 15 and 26. The plaintiff is the owner and operator of a first-run motion picture theatre[1] located in downtown

[1] A "first-run" theatre is one which exhibits feature films that have not been shown theretofore within the area.

Philadelphia. The defendants are three exhibitors,[2] whose theatres are in competition with that of the plaintiff, and six major distributors[3] of motion pictures. The complaint alleges generally that during the period here in question the defendants were engaged in a conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C.A. 1; the allegation is denied in the answers.

The plaintiff charges specifically that the defendants entered into or consciously adhered to certain agreements, the objects of which were to maintain an equal division of product among the defendant exhibitors and to eliminate the plaintiff from the competitive market. It is argued that each of the defendant distributors, in furtherance of the objects of the said agreements, engaged in conduct from which it may be inferred that an illegal conspiracy existed. This conduct is said to have consisted of:

> (1) the routine rejection of "superior" bids or offers submitted by VIKING, and the allocation of films to the defendant exhibitors pursuant to the said agreements;
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> (2) the requirement that VIKING offer "excessive" rentals as a prerequisite to its right to license film;
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> (3) the adjustment of film rentals and playing time for the defendant exhibitors and the denial of similar adjustments to VIKING;

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[2] William Goldman Theatres, Inc. (GOLDMAN); Stanley Company of America and Stanley Warner Management Corporation (STANLEY WARNER); Fox Philadelphia Building, Inc. (FOX).

[3] Paramount Film Distributing Corporation (PARAMOUNT); Warner Bros. Pictures Distributing Corporation (WARNER BROS.); Metro-Goldwyn-Mayer (METRO); Columbia Pictures Corporation (COLUMBIA); United Artists Corporation (UNITED); Universal Film Exchanges, Inc. (UNIVERSAL); Twentieth Century-Fox Film Corporation (TWENTIETH CENTURY).

(4) the requirement that VIKING, but not the defendant exhibitors, submit written bids;

(5) the imposition of discriminatory advertising conditions on VIKING;

(6) the requirement that VIKING make extensive commitments as to playing time in order to license film;

(7) the institution of discriminatory law suits against VIKING; and

(8) the requirement that VIKING license unwanted pictures in order to obtain those it desired.

A full and detailed discussion of these charges will follow.

The action came to trial before the Court and a jury. At the close of the plaintiff's evidence and on the motion of the defendants, the Court directed a verdict in favor of the defendants on the ground that the evidence was legally insufficient to sustain either the charge of conspiracy or the claim that the plaintiff had been injured in its business. This appeal is from the judgment entered on the said verdict. The plaintiff challenges as erroneous the said ruling of the Court, and in addition thereto several rulings which resulted in the exclusion of certain evidence.

The plaintiff argues that notwithstanding "the erroneous exclusions" of certain evidence, the evidence in the record was sufficient as a matter of law to support the charge of conspiracy and to warrant the submission of the case to the jury. The determination of the legal issue raised by this argument requires consideration of the evidence in its entirety, and as it relates to each of the defendants. The evidence, including the inferences of which it is reasonably susceptible, must be viewed in the light most favorable to the plaintiff. *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 696, 697 (1962); *Delaware Valley Marine Sup. Co.* v. *American Tobacco Co.*, 297 F. 2d 199 (3rd Cir. 1961), cert.

den. 369 U.S. 839 (1962). The question is whether the evidence thus viewed was legally sufficient to warrant submission of the case to the jury.

Distribution of Motion Pictures

The distribution of films constitutes the wholesaling sector of the motion picture industry. Because of the cost of reproducing a film print from the master negative, only a limited number of prints of each picture are available for distribution. The distributors procure the prints from producers and license them to exhibitors for a limited time on a rental basis. The pictures are distributed nation-wide, and it is through the distributors that all exhibitors must obtain prints for exhibition. It is the objective of the distributors to secure the greatest amount of film rental which can be realized from the exhibition of their films throughout the country.

This action encompasses a period of 123 weeks, between July 2, 1954, and November 13, 1956, during which the defendants distributed approximately 420 pictures for first-run exhibition. There were twelve theatres in the downtown Philadelphia area engaged in the first-run exhibition of films. The number of exhibtors competing for a particular picture depended generally upon the exhibitors' opinions of the grossing potential of the film, the availability of open playing time, and other factors hereinafter discussed. There were many times in which only one exhibitor manifested an interest in licensing particular pictures; there were other times in which several exhibitors manifested such an interest.

The nature of the charges made here requires some consideration of the quality of the films distributed by the defendants. The term "quality," in the context of this suit, is meaningful solely in the sense that it represents the earning power of a particular film. The earning power can

be determined only after the film has been exhibited. There is in evidence a stipulation which shows the national film rental[4] earned by each picture distributed by the defendants. The national film rental reflects neither the total gross achieved by a picture nor its earning power in any particular area. However, absent any other evidence, the criterion may be regarded as some indication of earning power.

The national film rental earned by pictures distributed by the defendants varied over a wide range. The stipulation reflects the film rental earned by only 405 of the pictures distributed. Of this number, 195 earned less than $1 million, and among these were 107 which earned less than $500,000. Of the 210 films earning more than $1 million, 101 earned more $2 million, 55 earned more than $3 million, 34 earned more than $4 million, and 19 earned more than $5 million. There were only 11 pictures which earned more than $6 million.

Methods of Distribution

The evidence in this case discloses that the defendant distributors in several respects followed a general pattern in the distribution of feature films for first-run exhibition. It was their usual and customary practice to give notice to the exhibitors of the expected release of films and the approximate dates of availability.[5] The exhibitors were then afforded the opportunity to "screen"[6] the pictures at places designated by the distributors. The films were

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[4] "National film rental" is the total rental earned by a picture from its exhibition throughout the country.

[5] Date of availability is the choice of the distributor and indicates his preference as to the approximate date on which the picture shall open in first-run theatres.

[6] Feature films are privately shown to exhibitors to afford them the opportunity to evaluate the pictures and their earning potential.

licensed theatre by theatre and picture by picture. There was otherwise little similarity in the methods employed.

Films were usually licensed on a competitive basis but practices varied from distributor to distributor. There were instances in which the distributors solicited competitive bids, reserving the right to reject all bids and to thereafter negotiate with interested exhibitors. There were other instances in which the exhibitors were requested to submit offers which were then used as a basis for negotiation. There were still other instances in which the distributors would invite selected exhibitors either to submit bids or to negotiate for particular pictures. The method employed, and any variance therefrom, was the independent and individual choice of each distributor.

Terms and conditions of both bids and offers varied from exhibitor to exhibitor and picture by picture. Film rental was usually based on a percentage of gross receipts. There were proposals in which film rental was based on a flat percentage of weekly gross receipts less house costs for each week, the percentage remaining constant. There were others in which film rental was based on a scale of precentages adjusted downwardly week by week. There were still others in which film rental was based on a sliding scale of percentages, the proposal providing for the upward or downward adjustment of percentages within certain limits, depending on gross receipts. Offers and bids were frequently accompanied by cash guarantees which were payable in the event earned film rental fell below the amount of the guarantee.

The evidence shows that it was customary for bids and offers submitted by the exhibitors to include provisions fixing responsibility for the payment of advertising expenses. In most instances, this responsibility was shared by the distributors and the exhibtors on a percentage basis. The share of advertising expense to be borne by each party

often corresponded with the percentages provided for the payment of film rental. In other cases, the percentage of advertising expense was arbitrarily selected, with no relation to film rental terms. In still other cases, bids and offers remained silent on the matter of advertising, it being understood that further negotiations were contemplated. In each case, the responsibility for determining the amount and type of advertising for any picture remained with the distributor.

Exhibitors ordinarily indicated the date upon which they proposed to commence the exhibition of a picture. It was important to the distributors that this date correspond with the availability date because of the importance of the latter date in the predetermined pattern of national exploitation. Changes in opening dates were negotiated in some instances to accommodate exhibitors, the final decision as to any change resting exclusively with the distributor.

Bids and offers submitted by exhibitors also provided for the length of playing time to be afforded a film. The length of playing time varied from picture to picture. In most cases the exhibitors guaranteed a minimum playing time, with any additional time contingent on the realization of a fixed minimum in gross receipts. In other cases there was solely a guaranteed minimum playing time, with no provision for additional time. There were several cases in which the length of playing time was determined by negotiations subsequent to the opening date of the picture. The evidence indicates that the exhibitors were, on occasion, permitted to exhibit a picture for a shorter period than that provided by the licensing agreement, and, on other occasions were requested by the distributors to terminate the exhibition of a film short of the agreed date. Any adjustment in the guaranteed playing time required the consent of the distributor.

Evaluation of Bids and Offers

As heretofore noted, distributors of motion pictures are primarily concerned with the maximum return of rental from the exhibition of films throughout the country. Prior to the release of a picture the distributor endeavors to evaluate it in terms of earning potential. This evaluation requires consideration of such factors as the intrinsic merit of the film, the prospects of public acceptance, and the setting of the film in an overall national release pattern. While earning potential cannot be determined with precision, it plays a significant role in the licensing of film.

There are numerous factors which, in the judgment of the distributor, may be determinative of the relative superiority of the bids and offers submitted and of the degree to which they correspond to the expected earning potential of the picture. The financial terms and conditions proposed by the exhibitor are, of course, important. Also of importance are the earning and exploitation potential of the theatres, as may be indicated by their locations and seating capacities, their performance records, the experience of their management, the suitability of their accommodations, and their standards of maintenance. Additional considerations of consequence to the distributor, as hereinabove noted, are the opening date and the proposed length of playing time. Finally, as in any business relationship, the distributor will be concerned with the commercial practices of the exhibitors and their financial integrity.

The final account between the exhibitor and the distributor is settled at the conclusion of the exhibition period. The settlement involves a determination of the film rental earned and payable, and the allocation of the advertising expenses. The evidence shows that the final accounting resulted on occasion in the downward adjustment of the agreed film rental terms. These adjustments were essentially rebates and were negotiated in those cases where a

distributor responded to a complaint that an exhibitor had incurred losses from the exhibition of a film. The grant of an adjustment was within the sole discretion of the distributor.

HISTORY AND PERFORMANCE OF VIKING THEATRE

The plaintiff is the owner of the Viking Theatre, which was purchased from the defendant STANLEY WARNER in 1953. Prior to its acquisition by the plaintiff the theatre had been operated as a first-run house under the name of the Aldine. When control of the Stanley Warner circuit was acquired by Simon Fabian, also in 1953, he decided to sell the theatre for commercial purposes and thus eliminate it as a theatre. The decision was prompted by the then existing scarcity of pictures and the fact that the theatre had been operating at a loss. When Simon Fabian learned that it was the intention of the plaintiff to renovate and operate the theatre, he attempted to repurchase it, but the parties failed to agree on the price. The theatre was completely renovated, and thereafter, on July 2, 1954, opened as a first-run house.

It is here conceded that the plaintiff, by letters addressed to each of the defendant distributors, requested the opportunity to either share in or bid for available pictures suitable for exhibition in a first-run theatre. Thereafter, and during the period in suit, the plaintiff licensed and exhibited first-run pictures. At the same time there were in the area eleven other first-run theatres, and of this number, seven were owned by the defendant exhibitors and four were owned by non-defendants. These exhibitors were actively engaged in competition for available pictures. The names of the theatres, their ownership, location and seating capacities, are set forth in Appendix A.

The plaintiff made known to the distributors its interest in eighty-seven pictures and, of these, licensed and

exhibited thirty-four. Films were licensed to VIKING on bids submitted as well as by competitive negotiation. The pictures sought and not obtained by VIKING were licensed to non-defendant as well as defendant exhibitors. Of the films licensed to VIKING, twenty-one had a national film rental in excess of $1 million, and of these, eight had a national film rental in excess of $2 million; two had a national film rental in excess of $3 million, and of these, one had a national film rental in excess of $6 million.

The VIKING opened on July 2, 1953, with a picture licensed from METRO. Thereafter, for a period of a year, it exhibited METRO product almost exclusively and manifested little interest in the pictures of other distributors. The plaintiff licensed nine of ten METRO pictures on which it submitted bids. The harmonious business relationship between plaintiff and METRO continued until June of 1955, when a dispute arose over film rental and advertising expenses. As a result of this dispute VIKING discontinued the relationship until August of 1956, when it submitted an offer for the picture "Tea and Sympathy."

The only UNITED picture on which the plaintiff submitted a bid during its first year of operations was "Barefoot Contessa." The bid, submitted on October 5, 1954, was rejected and the film was licensed to GOLDMAN. The second year of VIKING's operations opened with "Not As A Stranger," one of the two best pictures distributed by UNITED during the entire period of suit. This picture was licensed to the plaintiff on a bid submitted on April 25, 1955. Thereafter, the plaintiff manifested an interest in sixteen additional pictures and licensed eleven, three on bids and eight by negotiation.

The evidence in this case shows that the product of TWENTIETH CENTURY was available to all exhibitors and was licensed on the basis of open competitive bidding. The plaintiff did not become interested in TWENTIETH CENTURY pictures until after March 1955, when Jay Wren became

manager of the VIKING. The plaintiff submitted bids on fifteen pictures, and, of these, licensed and exhibited eight; the others were license to Fox. The average national film rental of the pictures licensed to VIKING was one million two hundred thousand dollars.

The plaintiff first endeavored to obtain UNIVERSAL product in April of 1955, when it submitted an offer on "Fox Fire," a picture which had a national film rental in excess of one million five hundred thousand dollars. This bid was withdrawn. In the latter part of 1955, the plaintiff negotiated for, and was granted a license on, "All That Heaven Allows," on the condition that it also license three additional pictures. Thereafter, the plaintiff manifested no interest in UNIVERSAL product until after the period in suit.

The plaintiff submitted offers on only three of the seventy pictures distributed by COLUMBIA. These offers were rejected, and thereafter two of the films were licensed to GOLDMAN and one to STANLEY WARNER. The plaintiff submitted bids on thirteen of the thirty-nine pictures distributed by PARAMOUNT but was granted a license on only one. The plaintiff submitted bids on ten of the forty-eight pictures distributed by WARNER BROS., and licensed one, which was exhibited after the period in suit. Licenses for five were granted STANLEY WARNER, and licenses for four were granted GOLDMAN.

DIVISION OF PRODUCT

When the plaintiff entered the market in 1954, there was in effect between GOLDMAN and STANLEY WARNER an agreement which contemplated a "split"[7] of certain pictures of each distributor. The defendants METRO and UNITED acquiesced in the arrangement prior to March of

[7] A "split," which was in common use in the industry, is in essence an agreement between exhibitors to divide product and to refrain from bidding against each other for pictures on their respective sides of a prepared list.

1953, subject to their right to solicit competitive bids on each picture and, upon the rejection of all bids on any picture, to negotiate with interested exhibitors. There is no direct evidence that COLUMBIA or UNIVERSAL acquiesced in the split, but their pictures were, nevertheless, included on lists prepared by STANLEY WARNER and GOLDMAN.[8] We entertain serious doubt that anything other than independent judgment motivated the decisions to split product. However, resolution of the issue will not be necessary to the decision in this case.

The evidence shows that the agreement between STANLEY WARNER and GOLDMAN imposed no obligation on the distributors to include particular pictures on the list or to deal exclusively with the said exhibitors. The evidence affirmatively shows that every exhibitor was afforded the opportunity to bid or negotiate for the pictures of each distributor; in fact, many of the pictures listed on the split were licensed to non-defendant first-run theatres, including the plaintiff. It was further shown that the agreement imposed no obligation on the defendant exhibitors to bid or negotiate for the pictures on their respective sides of the split.

The defendant PARAMOUNT agreed to a split of its product between STANLEY WARNER and GOLDMAN in March of 1953, subject, however, to its right to solicit competitive bids from all exhibitors and for all pictures.[9] Later in the same year the split arrangement was modified in order to resolve a controversy arising out of GOLDMAN's consistent refusal to bid for PARAMOUNT's pictures. It was agreed that GOLDMAN would not be required to submit bids, but the effect of the modification is otherwise not clear. However, there

[8] The pictures of TWENTIETH CENTURY were not split between STANLEY WARNER and GOLDMAN. They were customarily exhibited by Fox.

[9] WARNER BROS. acquiesced in the split at the same time.

is evidence from which it may be inferred that the agreement[10] as construed by PARAMOUNT, contemplated exclusive negotiations with either STANLEY WARNER or GOLDMAN upon the rejection of all bids for any picture included on its split. This construction is refuted by most of the evidence, but we, nevertheless, accept it as the correct one for the purpose of argument.

ALLEGED CONSPIRACY

The plaintiff alleges that during the period in suit the defendants engaged in a conspiracy, the object of which was to deprive it of quality pictures,[11] on terms and conditions comparable to those afforded the defendant exhibitors. It is argued that the existence of the conspiracy is evidenced by the split system, the agreement between GOLDMAN and PARAMOUNT, and the actions of the defendants.

The plaintiff argues preliminarily that a split system, which, as here, does not include all exhibitors in the competitive area, constitutes a per se violation of the antitrust laws. It is not argued that all split systems are illegal; the substance of the plaintiff's argument is that those which do not include all exhibitors are per se illegal. We do not agree. We have heretofore noted that each exhibitor was at all times afforded the opportunity to license the pictures of each distributor notwithstanding the split. There is no evidence that any exhibitor requesting participation in the split of product would have been excluded.

We are of the opinion that the failure to include all exhibitors in the split system will not render it illegal in the absence of evidence that it was so employed as to unreasonably restrict the competitive market, or had this result. *Brown* v. *Western Massachusetts Theatres, Inc.*, 288

[10] Herein identified as the "Paramount Agreement."

[11] The criterion employed by the plaintiff is the national film rental of each picture.

F. 2d 302 (1st Cir. 1961); *Schad* v. *Twentieth Century-Fox Film Corporation*, 136 F. 2d 991 (3rd Cir. 1943). There is no evidence in this case that the split system, standing alone, had this effect, or was so intended. Therefore, we decline to hold the split system to be per se illegal, and we do not consider the system, standing alone, as evidence of a conspiracy to violate the antitrust laws.

Plaintiff advances the argument that the split system resulted in an artificial price structure which gave the defendant exhibitors a competitive advantage over other exhibitors. The argument lacks validity because of the absence of evidence that the split had this effect. There is no evidence in this record from which it may be inferred that any artificiality of price structure existed; in fact, plaintiff made no attempt to offer such evidence.

As an alternative, the plaintiff takes the position that the agreement made by STANLEY WARNER and GOLDMAN with PARAMOUNT so modified the split as to render it unlawful, and that the agreement constitutes direct evidence of an illegal conspiracy. The illegality is said to arise from the requirement that PARAMOUNT negotiate exclusively with either STANLEY WARNER or GOLDMAN upon the rejection of all bids for inadequacy. The agreement may not be held illegal within the framework of this case unless the other distributors gave their adherence to the plan and participated in it. *Interstate Circuit* v. *United States*, 306 U.S. 208, 222 (1939); *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 312 (1923). Essential to the violation of the antitrust laws is an agreement or combination, the purpose and effect of which is restraint of trade and suppression of competition.

The plaintiff urges that in fact each of the other distributors, having knowledge of the Paramont Agreement, acquiesced in and adhered to it. While there is no direct proof to this effect, the plaintiff argues that the evidence as to the course of conduct followed by each distributor was sufficient to support the inference of concerted action pur-

suant to a common understanding. The crucial question is whether there was sufficient evidence from which a jury could infer that such concerted action existed.

The plaintiff refers to those alleged instances wherein pictures appearing on either the STANLEY WARNER or GOLDMAN side of the "split" lists were licensed to them on the basis of exclusive negotiation after bids of all interested exhibitors had been rejected. We note preliminarily that the Paramount Agreement was applicable only to those pictures included on the "split," and required: (1) that there be a bidding situation; (2) that all bids be rejected; and (3) that there be exclusive negotiation with either STANLEY WARNER or GOLDMAN.

The plaintiff's brief specifically cites thirteen pictures, twelve of which were licensed to GOLDMAN and one to STANLEY WARNER upon the rejection of all bids; of these pictures, four were licensed by PARAMOUNT, four by WARNER BROS., two by COLUMBIA, two by UNITED, one by METRO, and none by either TWENTIETH CENTURY OR UNIVERSAL. The brief significantly makes no reference to twenty-seven pictures which were licensed to other exhibitors, including fifteen which were licensed to the plaintiff, notwithstanding their inclusion on the "split."

The product of TWENTIETH CENTURY was licensed picture by picture on a competitive bidding basis, except where no bids were submitted. Its product was not split between STANLEY WARNER and GOLDMAN, and was apparently made available to all interested exhibitors. There is no evidence that this defendant at any time rejected all bids and thereupon negotiated with any exhibitor. The record is devoid of evidence from which it can be inferred that TWENTIETH CENTURY was aware of the PARAMOUNT agreement, or, if aware of it, participated in the plan of distribution contemplated.

The plaintiff complains of but a single picture licensed to GOLDMAN by METRO. This picture was not on any split

list, and the grant of the license was within the exclusive control of the producer. There is evidence that of the nine METRO pictures licensed to VIKING, six were listed on either the STANLEY WARNER or GOLDMAN side of the split.

The plaintiff contends that two pictures released by UNITED were licensed to GOLDMAN on the basis of exclusive negotiation upon the rejection of all bids. It appears from the testimony that one of these was licensed after UNITED attempted to negotiate with exhibitors in addition to GOLDMAN, and as to the other, the evidence is clearly deficient. There is evidence that of the eleven UNITED pictures licensed to VIKING, eight were listed either the STANLEY WARNER or GOLDMAN side of the split.

There is a reference to three instances in which the pictures of WARNER BROS., were licensed to GOLDMAN on negotiated terms upon the rejection of all bids. There is testimony that WARNER BROS., did not attempt to negotiate with VIKING, but no testimony that it did not attempt to negotiate with other exhibitors. There is a reference to a fourth picture which licensed to STANLEY WARNER, apparently without competitive bidding.

The two pictures of COLUMBIA were licensed to GOLDMAN an negotiated terms after all offers were rejected. These pictures were not on any split list. It therefore cannot be seriously argued that they were licensed in conformity with the plan contemplated by the PARAMOUNT agreement. There is no evidence that the negotiations were exclusive. There is no evidence in the record that UNIVERSAL employed the split system as an integral part of its plan of distribution.

We have given close consideration to all of the evidence which might bear on the issue of general adherence to the Paramount Agreement. There is ample evidence that on many occasions the distributors acted in a manner directly contrary to its terms. The evidence as a whole fails completely to support the alleged uniform plan of distribution

incorporating terms such as those embodied in the Paramount Agreement. We are of the opinion that a jury would not be justified in inferring that any distributor, other than PARAMOUNT, either knew of, acquiesced in, or adhered to the agreement.

CIRCUMSTANTIAL EVIDENCE

The plaintiff points to certain additional conduct of the defendants as indicative of a conspiracy to restrain trade and eliminate the VIKING as a competitor. It is argued that this conduct alone is sufficient to make out a prima facie case of conspiracy, and further shows that the split system was illegally employed as a device to restrain trade. In essence, the charge is that the defendant distributors engaged in certain practices in order to deprive the plaintiff of a fair share of the market and to ensure to the defendant exhibitors a competitive advantage. The plaintiff introduced evidence relating to actions taken and decisions made by the distributors during the period of suit and urges that the circumstances attendant upon these actions and decisions would entitle a jury to infer the existence of a common understanding among all the defendants.

REJECTION OF BIDS

The plaintiff charges that each of the distributors routinely rejected "superior" bids and offers submitted by the VIKING and thereupon allocated the picture to the defendant exhibitors. To support the charge, plaintiff undertook to compare certain of its bids and offers with those submitted by the defendants. This was accomplished by first ascertaining the gross receipts earned by an exhibitor defendant for a particular picture. It was then assumed the plaintiff would have achieved the same gross receipts had it been able to exhibit the picture. The plaintiff then applied the terms of its bid or offer to the figure thus determined. By this method plaintiff arrived at a

figure intended to represent the film rental it would have earned had its bid or offer been accepted. This latter was then compared to the rental actually earned and paid by the theatre which exhibited the picture. The plaintiff recognized that in some instances the VIKING could not achieve the gross receipts achieved by the other theatres, particularly the larger ones, in the same period of time. In these instances it was assumed that additional playing time would enable the plaintiff to achieve any gross reached by any of the defendants' theatres.

The comparisons, thus arrived at, are said to show that the plaintiff's bids or offers for twenty-nine pictures, if accepted, would have earned for the distributors more film rental than was earned by the defendant exhibitors. On the basis of these comparisons, the plaintiff urges that it may be inferred that the distributors rejected its bids and offers with intent to injure the plaintiff, pursuant to a common scheme. In our opinion, the comparisons failed to support the inference urged.

The technique employed to arrive at the comparisons can be afforded but little legal significance. The assumption that the plaintiff was capable of achieving grosses comparable to those achieved by the defendant exhibitors was not supported by the record.[12] The admission that plaintiff required substantially more playing time to achieve comparable grosses is not unimportant in an evaluation of the financial terms of competing bids. Nor is its importance lessened in an evaluation of the expenses of advertising and of the exploitation potential of a picture in an integrated national pattern of release. We note

[12] The plaintiff offered to prove the grossing potential of VIKING by evidence that "its box office receipts amounted to 2.52% of the total national film rental of all pictures played," and that "the average figure for all the defendant's theatres was 1.88%." Aside from its highly speculative nature, the evidence was without probative value and was properly rejected.

further that the comparison technique generally ignores such terms as the availability date and the length of playing time.

Another defect inherent in the comparison technique is its reliance upon a hindsight determination of the grossing power of films. As we have heretofore noted, the distributor, at the time the bids must be evaluated, is unable to predict accurately the degree of success which may be attained by a picture. The distributors deal with a product which does not have a readily ascertainable market value, and must of necessity rely on a certain amount of guesswork. The inevitably of wrong guesses can receive no greater attestation than the record in this case. We approach with no little trepidation the prospect of permitting a jury to draw the inference desired by the plaintiff on the patently insubstantial basis of the comparison technique employed here.

The comparisons relied upon were less than equivocal. It cannot be seriously contended that each of the comparisons supports the plaintiff's thesis. The record clearly discloses that fully eleven bids and offers of the plaintiff were in fact inferior.[13] There were five instances in which the differences in financial terms were so minimal as to be insignificant, and four in which the financial terms were admittedly comparable. There were only nine bids or offers which, on the basis of the comparison technique employed, were arguably superior. There were in this first group four bids submitted to WARNER BROS., in which the plaintiff offered a flat film rental, less house costs, for each week of exhibition. This type of bid, because of the requirement that the distributor bear the house costs for each week, points up the significance of the plaintiff's concession that it required more playing time to achieve comparable

[13] Plaintiff originally claimed that bids on four additional pictures were superior but the claim was withdrawn at the trial, when it was demonstrated that the bids were clearly inferior.

grosses. We note that in each instance WARNER BROS. licensed the picture on a percentage of gross receipts basis. Plaintiff's claim of superiority, therefore, rests on pure conjecture.

The plaintiff called as witnesses representatives of each of the defendant distributors. These representatives testified at length with respect to the consideration given to the plaintiff's bids and offers and the bases upon which they were rejected. This testimony made clear the difficulties involved in the evaluation process. It was readily admitted that in the administration of a competitive system mistakes could be made.

The difficulties inherent in the evaluation of competitive bids and offers were recognized by the Supreme Court in *United States* v. *Paramount Pictures*, 334 U.S. 131, 163 (1948), wherein the Court stated:

> "The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well-nigh impossible, unless perhaps all the exhibitors in the country were given classifications of responsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distributors, some effort to standardize the factors involved in determining 'a reasonable return to the licensor' would seem necessary."

See also *Brown* v. *Western Massachusetts Theatres, Inc.*, *supra*.

Because of the unsubstantial nature of the comparison technique employed and the equivocal results of obtained by the application of that technique, we are of the opinion that it would be impermissible to allow a jury to draw the infer-

ence that the rejection of the plaintiff's bids resulted from an intent to discriminate. A jury is permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation. Therefore, we hold that the evidence was insufficient to support the claim that the distributors rejected superior bids of the plaintiff in furtherance of a common plan.

RENTAL ADJUSTMENTS

There is testimony in the record that the plaintiff requested film rental adjustments on twenty-one pictures on which it allegedly sustained a loss, and was granted two adjustments by UNITED and one by METRO. The plaintiff offered to prove generally that the adjustments granted each of the defendant exhibitors were more numerous and larger in total amount. The proof was intended to show that as part of the conspiracy the defendant exhibitors were accorded preferential treatment.

The offer of proof identified the exhibitors allegedly favored but failed to indicate which of the distributors were guilty of the alleged discrimination. We are of the opinion that the offer of proof was properly rejected. The facts which the plaintiff offered to prove could have had no legal significance in the absence of additional evidence which would afford a reasonable basis of comparison between the adjustments granted the defendant exhibitors and those denied the VIKING. There is no such evidence in the record and none was offered.

It is difficult to perceive how either WARNER BROS., COLUMBIA or PARAMOUNT can be charged with the discriminatory denial of adjustments to the plaintiff. The VIKING exhibited no pictures of either WARNER BROS., or COLUMBIA, and only one of PARAMOUNT'S. There was no request for an adjustment on the PARAMOUNT picture. There is nothing in the evidence nor the offer of proof to indicate that either METRO or UNITED granted film rental adjustments to any

of the exhibitors except the plaintiff. It was the policy of TWENTIETH CENTURY to deny adjustments on pictures licensed on a competitive bidding basis. This policy cannot be regarded as discriminatory.

The only specific evidence relating to discriminatory adjustments was a schedule, from which it appears that UNIVERSAL granted adjustments on seven pictures played by GOLDMAN and on three played by STANLEY. The charge of discrimination leveled against UNIVERSAL is rebutted by the evidence that it offered the plaintiff an adjustment of fifteen thousand dollars on three pictures. This offer was withdrawn when UNIVERSAL learned of the plaintiff's intention to institute the present action. The plaintiff argues that the adjustment was offered on condition that the present action as to UNIVERSAL be withdrawn; the evidence in the record is to the contrary.

The plaintiff also complains of alleged discriminatory treatment in the adjustment of playing time. We have reviewed the record in the light of this complaint and find that there is no evidence to support it.

EXCESSIVE PLAYING TIME

The plaintiff alleges that the defendant distributors "required" the VIKING to make extensive playing time commitments in order to license film. More particularly, it is claimed that the plaintiff was unable to license film unless it agreed to play them for "excessive" periods of time. It is argued that, as a result, the plaintiff experienced long periods of time in which it was unable to seek desirable films and was prevented from realizing an optimum return on the exhibition of pictures. The alleged requirement is said to have been discriminatory in that the defendant exhibitors were permitted to exhibit films for shorter periods of time.

The record in this case shows with clarity that playing time for pictures varied. It may be said that generally the

playing time was longer for those pictures with the higher earning power. However, the record also shows that the playing time for pictures having comparable national film rentals varied considerably. Playing time for pictures with comparable grosses in the Philadelphia area varied as well.

The plaintiff's claim that its playing time commitments were "required," warrants considerations. At the time that bids or offers are solicited and submitted, neither the distributor nor the exhibitor can foretell with accuracy the most appropriate playing time to be afforded to particular films. It is evident that it was the practice of the distributors to refrain from advance indication of what they considered to be an acceptable playing time commitment. The exhibitors, therefore, assumed the initiative in the determination of playing time by the submission of proposals to the distributors. There is nothing in the record from which can be drawn any inference other than a uniform adherence to the described practice.

There is no evidence that any distributors indicated in any manner that it required plaintiff to submit bids or offers providing for any specific playing time. Nor is there any evidence that any distributor indicated to the plaintiff that the rejection of any bid or offer was the result of an inadequate playing time commitment. It is clear that the plaintiff was at liberty to offer whatever playing time it desired The distributors could determine what playing time the plaintiff deemed to be reasonable only by consulting the terms offered. The notion that acceptance of those terms can be transformed into a "requirement" that they be offered is less than appealing. In sum, there is no little difficulty in plaintiff's assertion that it was "required" to make any particular commitments as to playing time. However, we shall consider the further argument that the defendant exhibitors were permitted to license film for playing periods less than those granted to plaintiff.

We are of the opinion that the revelant evidence was legally insufficient to afford a valid basis for comparison. There is evidence in the record as to the length of time VIKING played each picture licensed to it. The evidence as to the length of time comparable pictures played threatres of the defendant exhibitors is negligible. What little evidence there is clearly indicates that pictures played by the defendant exhibitors, comparable to those played by the VIKING, were exhibited for both longer and shorter periods. The disparities were minimal and of no legal significance. There is nothing in the record, or in any offer of proof made by the plaintiff, from which the jury could have reasonably inferred that there was any discriminatory practice as to playing time.

FILM RENTALS

It is charged that in furtherance of the conspiracy, the defendant distributors "required" the plaintiff to pay "excessive" film rentals. The term "excessive" implies an amount too great to be fair and reasonable. To support the charge, the plaintiff attempted a comparison of the film rental it paid with that paid by the defendant exhibitors. There is evidence in the record that during the entire period in suit the total film rental paid by the plaintiff was equal to 52% of its total gross receipts. There is further evidence in the record that the total film rental paid by all of the defendant exhibitors was equal to 40% of their total gross receipts.

In addition to this evidence, plaintiff "offered a comparison of the total film rental paid by each theatre for the pictures it played during the period of the suit as against the total national film rental on the same pictures." The offer of proof was intended to show that the plaintiff paid a higher proportion of national film rental on the pictures exhibited than did the theatres of the defendant exhibitors.

We have some difficulty in determining what inference could be drawn from either the evidence in the record or that offered by the plaintiff. The calculations are based upon a hindsight determination of the earning power of films exhibited, while licensing takes place before earning power, as reflected by gross receipts, can be determined. Therefore, the figures do not tend to reflect the rental terms which the parties to the license might foresee as being fair and reasonable. Moreover, the calculations provide no criteria determinative of "excessiveness."

We entertain serious doubt as to the probative value of the comparisons. The plaintiff's computation of gross film rental paid by it includes the total of six guarantees, each of which was considerably higher than the earned film rental. The reference is to the guarantees paid on pictures licensed by VIKING in the second year of its operations. Absent these guarantees, the comparisons are of little or no significance.

Whatever the comparisons are intended to show, there is no evidence from which it can be inferred that the plaintiff was "required" to offer excessive rental terms. There is likewise no evidence which would warrant a conclusion that the plaintiff was under any compulsion to offer guarantees which later proved to be excessive. The record is devoid of proof from which it can be inferred that any distributor was aware that the film rental offered were deemed by the plaintiff to be unreasonable. The rental terms were voluntarily proposed by the plaintiff; the acceptance of those terms by the distributors would not permit an inference that plaintiff was required to offer them.

The above deficiencies in the evidence aside, there is no proof, direct or circumstantial, that there was a common understanding among distributors with respect to film rentals. There is no evidence from which it can be inferred that any distributor had knowledge of the film rentals charged by any other distributor. There is nothing in the

evidence as a whole from which a jury could reasonably conclude that the distributors conspired to exact excessive film rentals from the plaintiff.

Advertising Arrangements

The plaintiff charges that "Viking was subjected to discriminatory advertising arrangements." To support the charge, the plaintiff made two offers of proof, one of which related solely to a dispute with Metro. Whatever the merits of this dispute, it stemmed from isolated occurrences unrelated to the conduct of any of the other defendants. This offer of proof was properly rejected.

The second offer of proof was intended to show that the "Viking paid a substantially greater percentage of its gross receipts for advertising than the defendant exhibitors did." Absent some evidence as to the nature and amount of advertising these expenditures represent, the offered comparison of percentages would have been meaningless. The plaintiff offered no such evidence and the offer of proof was therefore properly rejected. Upon careful consideration of the evidence in the record, we find no basis for the plaintiff's charge of discrimination.

Block Booking

Plaintiff further alleges that it was required to license unwanted pictures in order to obtain those it desired. This allegation relates to four pictures licensed to Viking by Universal. The plaintiff does not claim that the incident in and of itself was illegal but argues that it is evidence of Universal's complicity in the alleged conspiracy. There is no evidence that Universal's conduct was motivated by any understanding with any other defendant. Nor is there evidence that the arrangement was part of a common scheme contemplated by the other distributors, or that they were even aware of it. The concert of action necessary to conspiracy was clearly absent.

ADDITIONAL CHARGES

The plaintiff makes two additional charges against the defendant distributors: first, that VIKING, but not the defendant exhibitors, was required to submit written bids; and second, that VIKING was subjected to discriminatory law suits. We are of the opinion that these charges are so devoid of merit that they do not warrant discussion.

While our discussion has heretofore, and of necessity, been directed to the individual complaints of the plaintiff and the evidence relating thereto, we have been mindful of the propriety of viewing the evidence as an integrated whole and as it relates to the general allegation of conspiracy. As we have stated, the direct evidence adduced by the plaintiff falls far short of the minimum necessary to prove the existence of an unlawful agreement. In our view the circumstantial evidence also fails to meet the required minimum.

The gravamen of a civil action under the antitrust laws is conspiracy, the proof of which may rest, as it frequently does, on circumstantial evidence. The courts have recognized the difficulty in adhering in an attempt to prove conspiratorial conduct by such evidence. The difficulty has resulted in some relaxation of the requirements of proof and resort to the doctrine of "conscious parallelism." However ameliorative the doctrine may be, it has not dispensed with the requisite that conspiracy be proved. *Theatre Enterprises* v. *Paramount*, 346 U.S. 537 (1954); *Delaware Valley Marine Sup. Co.* v. *American Tobacco Co., supra; Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 306 F. 2d 61 (3rd Cir. 1962), cert. den. 371 U.S. 951 (1963). In the application of the doctrine the courts have recognized that certain parallel behavior is inherent in many business settings. Therefore, it has been held that proof of a conspiracy may not rest on similarity of conduct in the absence of evidence that the alleged wrongdoers were mutually aware of such conduct and that the mutual awareness

entered into their decisional processes. Ibid. See also *Brown* v. *Western Massachusetts Theatres, Inc., supra.*

While there is evidence that certain business practices of the defendant distributors were similar, there was not the substantial uniformity, in response to plaintiff's request for product, such as was present in three motion picture cases previously decided by this Court.[14] However, the weakness in the plaintiff's proof does not lie in this deficiency alone. The evidence, viewed in the light most favorable to the plaintiff, was clearly insufficient to warrant a reasonable inference that any defendant was aware of any other defendant's reaction to plaintiff's requests for product. Nor is there evidence, direct or circumstantial, that any defendant was cognizant of the terms and conditions upon which any other defendant licensed films to the which to draw an inference that the actions taken and the decisions made by the defendants were motivated by anything other than independent business judgment. Therefore, the direction of a verdict in favor of the defendants was proper.

Offer of Proof

The main argument of the plaintiff is that the rejection of the offers of proof placed an undue limitation on its attempt to prove conspiracy. We have heretofore considered each of the offers of proof and have determined that they were not of sufficient probative value to warrant the conclusions in support of which they were offered. This deficiency

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[14] *Milgram* v. *Loew's, Inc.*, 192 F. 2d 579 (3rd Cir. 1951), cert. den. 343 U.S. 929 (1952); *Ball* v. *Paramount Pictures, Inc.*, 169 F. 2d 317 (3rd Cir. 1948), cert. den. 339 U.S. 911 (1950); *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738 (3rd Cir. 1945), cert. den. 334 U.S. 811 (1948). There was in each of these cases, in addition to proof of parallelism, "a web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement." *Delaware Valley Marine Sup. Co.* v. *American Tobacco Co., supra,* at page 205, footnote 19.

aside, the relevancy of the proffered evidence to the issue of conspiracy was, at best, tenuous. The plaintiff was afforded ample opportunity to inquire into the conduct of the defendants during the period in question. The inquiry was wide and produced a mass of evidence relating to the charged conspiratorial conduct. We are convinced, upon our review of the record, that the proffered evidence could have added little significance to that already in the record. Therefore, the rejection of the offers of proof cannot be regarded as improper.

Proof of Damage

Since we have decided that the evidence as a whole was insufficient to sustain the charge of conspiracy, we see no reason to express an opinion as to the sufficiency of the proof as it relates to the issue of damages.

Pretrial Conference

The trial of this action required 41 full days and produced a record, which is anything but orderly, consisting of more than 7000 pages of testimony and a large number of written exhibits. This voluminous record emphasizes the importance of the pretrial conference to the efficient trial of the protracted case. We are convinced that the trial time could have been shortened considerably with a concomitant reduction in the size of the record if the attorneys had made a conscientious effort to (1) stipulate matters in which there was no dispute; (2) specify the issues with particularity; and (3) formulate an efficient trial plan. The condition of the present record clearly indicates that there was no such effort here.

The key to the manageable trial, and essential to the maintenance of an orderly record, is a specification of issues with particularity. We recognize the reluctance of many lawyers to be specific less they thereby forego some advantage which might unexpectedly develop in the course of

the trial. Whatever their objection, the necessity for specification of issues in the protracted case is so great as to require it. Absent such specification, the trial "cannot be confined to its proper limits, counsel are at a loss as to their positions, and the judge is unable to relate the evidence to issues which are in dispute or to limit it to that which is relevant." *Prettyman Report*, 13 F.R.D. at 66-67. We are of the view that it is not unreasonable to expect the attorneys to agree on matters as to which there is no dispute and to precisely defined the triable issues.

The protracted case contributes to the congested calendar and consequently presents a major problem in those districts in which there is a concentration of this type of litigation. The solution to the problem lies in the effective, not the mere perfunctory, use of the pretrial procedures contemplated by Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.A. The failure to use these procedures in the protracted case can only result in the waste of judicial manpower, a waste which the administration of judicial business can ill afford.

The judgment of the court below will be affirmed.

APPENDIX A

Theatre	*Location*	*Owner*	*Seating Capacity* *Floor*	*Balcony*	*Total*
Viking	19th & Chestnut	Viking	947	70	1017
Goldman	15th near Chestnut	Goldman	988	200	1188
Midtown	Chestnut near Broad	Goldman	994	None	994
Randolph	12th & Chestnut	Goldman	1366	654	2020
Stanley	19th & Market	Stanley Warner	1450	1482	2932
Mastbaum	21st & Market	Stanley Warner	2498	1889	4387
Stanton	16th & Market	Stanley Warner	783	590	1373
Fox	16th & Market	Fox	1333	1089	2422
Translux	16th & Chestnut		493	None	493
Arcadia	16th & Chestnut		650	None	650
Studio	Market near 17th		400	None	400
World	Market (in 1800 block)		499	None	499

NOTE: The ownership of the last four theatres is of no relevance.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,756

VIKING THEATRE CORPORATION, *Appellant*

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION,
COLUMBIA PICTURES CORPORATION,
UNIVERAL FILM EXCHANGES, INC.,
UNITED ARTISTS CORP.,
WARNER BROS. PICTURES DISTRIBUTING CORP.,
TWENTIETH CENTURY-FOX FILM CORP.,
LOEW'S INCORPORATED,
STANLEY WARNER MANAGEMENT CORP.,
STANLEY COMPANY OF AMERICA,
WILLIAM GOLDMAN THEATRES, INC., and
FOX PHILADELPHIA BUILDING, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Present: BIGGS, *Chief Judge*, and GANEY and SMITH, *Circuit Judges*.

Judgment

This cause come on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF
Clerk

June 21, 1963